In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 858

JAMES BASS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 13) is reported at 326 F. 2d 884.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1964 (Pet. 12). The petition for a writ of certiorari was filed on February 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction for unlawful possession of marihuana.

2. Whether the court unduly limited cross-examination.

STATUTE INVOLVED

Section 4744(a) of the Internal Revenue Code of 1954 (as amended by the Narcotic Control Act of 1956, 70 Stat. 567) (26 U.S.C. 4744(a)) provides:

> § 4744 UNLAWFUL POSSESSION
>
> (a) *Persons in general.*
>
> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—
>
> (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
>
> (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.
>
> Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of obtaining marihuana without having paid the transfer tax imposed by the Internal Revenue Code, in violation of 26 U.S.C. 4744(a) (R. 109). He was sentenced to imprisonment for three years (Pet. 11).

The government's evidence showed that Robert Vaughn, in the presence of federal agent Snokhous (who arrested Vaughn), telephoned petitioner on August 21, 1962 from an apartment at 5963 Oakherst Place in St. Louis that he was ready to get the "pound of reefer" about which he had called earlier. Petitioner answered that it would take him 15 or 20 minutes to get there (R. 47–55). As Vaughn and Snokhous left the apartment building, petitioner arrived at the entrance (R. 8–11). There Vaughn told petitioner that Snokhous was the man who wanted the marihuana, that he had the money and was ready to "deal" (R. 42). Petitioner said that he did not have the "weed" with him and that he wanted to talk with Vaughn in private. After stepping aside with Vaughn for a minute, petitioner told Snokhous that he could obtain the marihuana and would return in thirty minutes. As petitioner entered the rear of a waiting taxicab, he was arrested. On the front seat of the cab, between the driver and one Vernell Booker, was a brown paper bag containing roughly a half pound of marihuana. Petitioner, when asked if he had the order form required by the Internal Revenue Act, answered in the negative (R. 13–22).

The cab driver who brought petitioner to the Oakherst address testified that on that night petitioner entered the rear seat of his cab at Sarah and St. Louis Streets and asked to be taken to 5963 Oakherst. He said, however, that he was expecting someone else and asked the driver to wait for a minute. Petitioner then instructed the driver to make a U-turn and to

stop at an alley a half block away. A man, later identified as Vernell Booker, came from the alley carrying a brown bag, entered the front seat of the cab and placed the bag on the seat between himself and the driver. Petitioner then instructed the driver to proceed to the Oakherst address. The driver did so, stopping once en route to pick up a woman passenger bound for another destination who sat in the rear seat with petitioner. At the Oakherst address petitioner asked the driver to wait for a minute while he alighted. Officers halted the cab as petitioner sought to reenter (R. 66–74).

ARGUMENT

1. Both courts below properly found that the evidence was sufficient to sustain petitioner's conviction of unlawful possession of marihuana within the meaning of 26 U.S.C. 4744(a). Possession may be proved by showing dominion and control over the narcotics. *United States* v. *Pisano,* 193 F. 2d 355 (C.A. 7). Here, it was petitioner who promised delivery and fixed the time. It was he who instructed the driver of the taxicab to wait for Booker who brought the narcotics. Once the marihuana had been placed in the car by Booker, it was petitioner who directed the driver to proceed to the point where he had promised delivery. Whatever Booker's relationship to petitioner, the evidence shows that petitioner had and exercised the authority to control the narcotics which Booker brought into the taxi.

There is thus no merit to the contention that Booker's possession of the marihuana precluded proof

of possession of the same marihuana by petitioner. As the court below pointed out, the dominion and control necessary to show possession may be established by circumstantial evidence even where another person has actual physical custody.[1] See *Teasley* v. *United States*, 292 F. 2d 460 (C.A. 9); *United States* v. *Santore*, 290 F. 2d 51 (C.A. 2), certiorari denied, 365 U.S. 834; *Evans* v. *United States*, 257 F. 2d 121 (C.A. 9), certiorari denied, 358 U.S. 866.[2]

2. On cross-examination agent Snokhous was asked about the circumstances of petitioner's arrest. In answer to questions by the defense, the agent said he had not known either the cab driver or Booker before that night (R. 35). He explained that their names were ascertained by other agents at the time of peti-

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[1] It follows, of course, that Booker's possession of the required order form would not aid petitioner. Even if Booker and petitioner could be deemed in joint possession, petitioner's own failure to produce the required form would bring the statutory presumption of guilt into operation as against him. See Section 4744(a), p. 2 *supra*; *United States* v. *Oropeza*, 275 F. 2d 558 (C.A. 7). *Perez* v. *United States*, 297 F. 2d 12 (C.A. 5), relied upon by petitioner, is inapposite, for in that case there was no evidence that either of two defendants found in possession of marihuana had failed to produce an order form. See 297 F. 2d at 14.

[2] In *United States* v. *Landry*, 257 F. 2d 425, the Seventh Circuit held that possession was not proved when the undisputed evidence showed that possession was in another person who said she was keeping the narcotics for him because, if she gave it to him, he would use it all at once. The same court has distinguished *Landry* in other cases on the ground that there "control was expressly negatived". *United States* v. *Davis*, 281 F. 2d 93, reversed on other grounds, 364 U.S. 505; *United States* v. *Taylor*, 266 F. 2d 310, certiorari denied, 361 U.S. 853.

tioner's arrest (R. 35–36). The court sustained objections to questions as to whether Snokhous knew the whereabouts of Booker, whether he obtained Booker's address when he learned his name and whether he revealed Booker's identity to petitioner or counsel prior to trial (R. 40).

These rulings were well within the scope of the trial court's discretion to control cross-examination. Booker was not in the government's control; petitioner himself states that Booker was not arrested (Pet. 5). If Booker was anyone's agent, he was petitioner's. Hence, questions to the agent as to Booker's whereabouts had no bearing on any possible issue in the case. No claim was made that petitioner sought the production of Booker as a witness or needed the government's help to obtain him.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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